

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEVEN RAY SCHILLEREFF,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

Case No. C06-5509 FDB

ORDER ADOPTING REPORT AND
RECOMMENDATION DISMISSING
PLAINTIFF'S PETITION FOR HABEAS
CORPUS WITHOUT PREJUDICE,
DENYING PETITIONER'S MOTION TO
SET ASIDE OR AMEND ORDER DENYING
MOTION TO STAY PROCEEDING AND
DENYING CERTIFICATE OF
APPEALABILITY

This matter comes before the Court on the Report and Recommendation of the Magistrate Judge that Petitioner's petition for habeas corpus relief be dismissed without prejudice as unexhausted and premature. Also before the Court is "Petitioner's Notice of Appeal" and corresponding "Motion to Set Aside or Amend the November 16, 2006, Judgment of the District Court Denying Petitioner's Motion to Stay Proceeding Pursuant to Federal Rules of Civil Procedure, FRCP Rule 59(e)." After having reviewed all materials submitted by the Petitioner and having reviewed the record, the Court is fully informed and hereby adopts the Report and

1 Recommendation and dismisses the petition without prejudice. The Court also denies the motion to
2 stay the proceedings and denies a certificate of appealability.

3 On October 18, 2006 the Magistrate Judge granted Petitioner leave to proceed *in forma*
4 *pauperis*. Petitioner then filed a motion to hold his petition for writ of habeas corpus in abeyance
5 pending exhaustion of state court remedies. On November 16, 2006, the Magistrate Judge denied
6 the motion. The Magistrate Judge noted that Petitioner acknowledged that his petition “is only a
7 preliminary skeleton” filed to stop the running of the time for filing a habeas corpus petition. The
8 Petitioner placed no information as to the length of the requested stay, provided no information as to
9 the state court challenge of his conviction and sentence, and did not show there was a danger he will
10 be time barred if the petition is not stayed. The Magistrate Judge subsequently entered a Report and
11 Recommendation that the petition for habeas corpus be dismissed without prejudice as unexhausted
12 and premature. As detailed by the Magistrate Judge, the one year time frame for seeking habeas
13 corpus relief has not begun to run and the petition is premature. As dictated by Rhines v. Weber,
14 544 U.S. 269 (2005), the Court has discretion to deny a stay of a habeas corpus petition where
15 petitioner has failed to show a danger that he will be time barred absent a stay.

16 Petitioner’s “Notice of Appeal” has been docketed as a request for a certificate of
17 appealability. A court will issue a certificate only when a petitioner has made “a substantial showing
18 of the denial of a constitutional right .” 28 U.S.C. § 2253(c)(2). To satisfy this standard the
19 petitioner must show that reasonable jurists would find the court's decision on the merits to be
20 debatable or are adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529
21 U.S. 473, 484 (2000). Plaintiff has failed to make the requisite showing. Not only has the petition
22 not been considered on the merits, Petitioner has not made a substantial showing of the denial of a
23 constitutional right.


24 ACCORDINGLY,

25 IT IS ORDERED:

26 ORDER - 2

- (1) The Court adopts the Report and Recommendation.
- (2) The petition [Dkt #5] is **DISMISSED WITHOUT PREJUDICE**.
- (3) The certificate of appealability (notice of appeal) [Dkt. #11] is **DENIED**.
- (4) The Motion to Set Aside or Amend [Dkt #14] is **DENIED**.
- (5) The Clerk is directed to send copies of this Order to Petitioner and to the Hon. J. Kelly Arnold.

DATED this 3rd day of January, 2007.



FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE